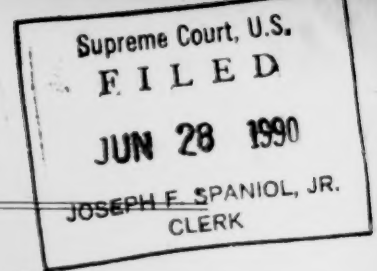


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No. 89-1850



IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

GEORGE M. HORN and
FERRELL S. HORN,

Petitioners,

v.

SMITH & MERONEY, a Professional
Corporation, and
ANNE E. MERONEY, Individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On January 8, 1990, the Court of Appeals of Georgia affirmed a Superior Court of Fulton County, Georgia Order granting Respondents a summary judgment on Petitioners' claim for legal malpractice. Petitioners now seek a writ of certiorari from this Court to review the adverse judgment entered against them, which judgment was unanimously affirmed at all appellate levels within the Georgia court system.

In October, 1983, Anne Halstead Horn, the widow of George Lawrence Horn ("the decedent") and the administratrix of his estate, contacted Anne E. Meroney of the law firm of Smith & Meroney, P.C., and asked Ms. Meroney to file a wrongful death action seeking damages for the decedent's death. Ms. Meroney was informed that the decedent had been killed in an airplane crash on July 9, 1983. The crash occurred while Henry Reeves Claxton and the decedent were participating in an air show and while Mr. Claxton was flying the plane. (R. at 176, 187-88).

After she was retained by Anne Horn, Ms. Meroney conducted a thorough investigation of the wrongful death case. Based on the Georgia residence of the defendant and the locale of the estates of Henry Reeves Claxton and the decedent, Ms. Meroney determined that the wrongful death action could be brought in Georgia. Since the decedent and Anne Horn had no children, Anne Horn was the proper party plaintiff to a wrongful death action. (R. at 177, 188).

Petitioners never asked Ms. Meroney or her firm to perform any legal services for them. (R. at 190-91, 206-09, 214-18). Indeed, the Respondents had no contact with the Petitioners at any time relevant to this lawsuit. (R. at 181-83, 200-04, 213-14). Instead, the Horns retained James J. Thompson, Jr., of Birmingham, Alabama, and others as their attorneys. (R. at 180-81, 204, 214-15). Because the Petitioners' interests were adverse to those of Ms. Meroney's client, Anne Horn, they consistently had independent representation. (R. 183-84, 191).

The Petitioners also filed various adversary proceedings against Anne Horn. (R. at 183-84, 191). In all

such cases, the Respondents represented Anne Horn and the Petitioners' interests were represented by other attorneys. (R. at 191).

Petitioners filed this action alleging legal malpractice by the Respondents. Petitioners' complaint raised no questions of federal law; it alleged only that Respondents, in their representation of Anne Horn, had somehow breached a duty to Petitioners and caused them damage.

Moreover, Petitioners never filed an expert's affidavit supporting their assertion of malpractice. However, Respondents filed two experts' affidavits in support of their motion for summary judgment. There was, therefore, no record evidence supporting Petitioners' contention that Respondents' services on behalf of their client fell below the standard of care.

On Respondents' motion for summary judgment, the Superior Court of Fulton County, Georgia found for Respondents. The court ruled that, as a matter of law, no attorney-client relationship existed between the Respondents and the Petitioners. (Court's September 6, 1988 Order; R. at 558-59). The Court also found that the Respondents acted with the requisite degree of care, skill and diligence in their representation of the Petitioners' daughter-in-law and that no act or omission by the Respondents proximately caused any of the Petitioners' alleged damages. Accordingly, the court entered summary judgment in favor of Respondents.

SUMMARY OF ARGUMENT

Petitioners seek review of the Georgia appellate courts' refusal to reverse the trial court's entry of summary judgment in favor of Respondents in this legal malpractice case. Petitioners have failed to demonstrate that any of the considerations for certiorari, as outlined in Rule 10 of this Court's Rules, is applicable.

No issues of federal law are present in this case. Additionally, Petitioners have failed to show any special or important reasons that would justify review by this Court. The issues are limited to this particular factual setting and will not have continuing future consequences.

Finally, even if this case did present proper issues for review by this Court, it is clear that the trial court properly entered summary judgment in favor of Respondents. In legal malpractice cases, Georgia law requires the presentation of expert testimony on whether particular conduct satisfies the applicable standard of care. Petitioners failed to submit any such testimony. Petitioners also failed to present any genuine issue of material fact as to whether an attorney-client relationship existed between themselves and Respondents or whether any conduct by Respondents proximately caused their alleged damages.

There is no basis in law or fact for Petitioners' claims. Accordingly, the Petition for Writ of Certiorari should be denied.

ARGUMENT

The Petitioners contend that they have been denied due process of law by the refusal of the appellate courts of Georgia to reverse the trial court's entry of summary judgment in favor of Respondents. What Petitioners actually seek is to have this Court review the record to determine whether the lower courts properly found that Petitioners had failed to present a genuine issue of fact as to any of the three elements of their legal malpractice claim.

Rule 10.1 of the Rules of this Court outlines the considerations governing the review on certiorari to a state court of last resort. When the standards of Rule 10 are applied to the instant case, it is clear that none of the considerations providing a basis for a grant of certiorari is present.

First, none of the considerations dealing with the review of decisions on federal law is applicable. This case involved a claim for legal malpractice brought under Georgia law. Neither the state trial court nor the Georgia appellate courts decided a federal question.

Second, there are no special and important reasons for granting certiorari. "'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Issues that arise within the framework of a unique factual setting and are not likely to have "continuing future consequences" are not generally issues that should be reviewed on certiorari. Harlan, *Manning the Dikes*, 13 Rec. A.B. City N.Y. 541, 552 (1958).

Here, Petitioners request that this Court review the pleadings and discovery in their case and decide whether, in light of the facts presented, the trial court correctly found that no genuine issue of material fact was presented on the questions of: (1) the non-existence of an attorney-client relationship; (2) Respondents' fulfillment of the duty of care; and (3) lack of proximate cause. These issues, which are clearly limited to a specific factual setting, will not have "continuing future consequences." Instead, they are exactly the type of "narrow" or "episodic" issues that should not be reviewed on certiorari.

Even assuming *arguendo* that there were some basis to go beyond the threshold question of whether this case presents a compelling reason for review, there was ample justification for the entry of summary judgment and the Court of Appeals' affirmance thereof. Under Georgia law, in the absence of expert testimony, it is presumed that legal services have been performed in an ordinarily skillful manner. *Ehlers v. Schwall & Heuett*, 177 Ga. App. 548, 340 S.E.2d 207 (1986); *Hughes v. Malone*, 146 Ga. App. 341, 247 S.E.2d 107 (1978). To prove a legal malpractice action, it is, therefore, essential that competent expert evidence be presented as to the nonacceptability of particular conduct. In cases where this presumption is not properly rebutted, summary judgment in favor of the attorney is proper. *E.g.*, *Mims v. Wardlaw*, 176 Ga. App. 891, 338 S.E.2d 866 (1985); *Johnson v. Butcher*, 165 Ga. App. 469, 301 S.E.2d 665 (1983); *Howard v. Walker*, 242 Ga. 406, 249 S.E.2d 45 (1978).

Georgia's commitment to requiring expert testimony in malpractice cases is also reflected by legislative

enactment. O.C.G.A. § 9-11-9.1. That statute, which became effective on July 1, 1987, just weeks after Petitioners filed their complaint, codifies the above-cited case law and requires plaintiffs in professional malpractice cases to submit an affidavit by an expert setting forth at least one act of malpractice along with the complaint.

Petitioners never submitted expert testimony to support their allegations of legal malpractice. Based on the Petitioners' failure to support their allegations of legal malpractice by way of an expert's affidavit, as is required by Georgia law, summary judgment was appropriately entered in favor of the Respondents. For this Court to disturb the Georgia courts' rulings would require invalidation of O.C.G.A. § 9-11-9.1 and reversal of a long line of established Georgia case law.

While the Georgia Court of Appeals relied exclusively on the absence of an attorney-client relationship between the parties in affirming the trial court's order, it is clear that the trial court's grant of Respondents' motion for summary judgment was also based on Petitioners' failure to submit expert testimony in support of their claim. This question is firmly settled in Georgia law and does not merit review by this Court.

Further, Petitioners failed to establish a material issue of fact as to the non-existence of an attorney-client relationship. The existence of such a relationship is essential to establish the requisite duty in a legal malpractice action. *Moore v. Harris*, 188 Ga. App. 251, 252, 372 S.E.2d 654 (1988); *Guillebeau v. Jenkins*, 182 Ga. App. 225, 355 S.E.2d 453 (1987).

There was simply no evidence before the trial court from which an attorney-client relationship could be found. On the facts of this case, summary judgment and the affirmance of that judgment were appropriate because there was no attorney-client relationship between Respondents and Petitioners. See *Moore*, 188 Ga. App. at 252, 372 S.E.2d at 655; *Guillebeau*, 182 Ga. App. at 229, 355 S.E.2d at 457. A review of this case on certiorari would require the Court to engage in a review of the factual record. That task was carefully done by the lower courts and does not warrant the attention of this Court.

The choice of law and deprivation of due process questions presented by Petitioners are without merit. The choice of law on the underlying wrongful death action was irrelevant to the questions of whether, as an initial matter, an attorney-client relationship existed between Respondents and Petitioners and whether Petitioners created an issue as to Respondents' satisfaction of the applicable standard of care. Moreover, all expert testimony in the record stated that Georgia law, and not Alabama law, applied. Finally, the Petitioners were not deprived of due process of law by the lower courts' rulings on the questions of whether an attorney-client relationship existed between the parties and whether Petitioners' complaint was adequately supported by competent expert testimony.

In short, the circumstances of this case do not justify the issuance of a Writ of Certiorari. Moreover, it is clear that the trial court acted correctly, and that its Order was properly affirmed by the Georgia Court of Appeals.

CONCLUSION

The essential substantive questions in this lawsuit are questions of Georgia law that are so well settled that the Supreme Court of Georgia declined to hear the case. The case raises no issues of federal law and is limited to a specific factual setting. As such, it does not present any special or important reason for review on certiorari. In any event, the Superior Court of Fulton County, Georgia, ruled correctly and in accordance with the applicable law.

The Petitioners' claims of constitutional deprivation are meritless. Respondents request that this Court deny the instant petition for writ of certiorari to the Supreme Court of Georgia.

Respectfully submitted,

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